

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KERRY LEMONTE RODGERS,

Petitioner,

No. CIV S-00-0961 LKK DAD P

vs.

CHERYL PLILER, Warden,

Respondent.

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a notice of appeal and motion for a certificate of appealability from this court's order filed September 13, 2005.

Attached to petitioner's October 28, 2005 filing is a proof of service in which petitioner declares under penalty of perjury that he placed the document in the mail in accordance with institutional procedures on October 10, 2005.

An appeal may not be taken from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" unless a certificate of appealability is granted. 28 U.S.C. § 2253(c)(1). See also Fed. R. App. P. 22(b). The final order in this proceeding was filed on September 23, 2003, and a certificate of appealability was issued on November 5, 2003. On appeal, the denial of petitioner's application for a writ of habeas corpus was affirmed by judgment filed April 13, 2005. Petitioner's new

1 appeal is from the order denying petitioner's motion for relief pursuant to Rule 60(b) of the
2 Federal Rules of Civil Procedure. Because the September 13, 2005 order is not the final order in
3 a habeas corpus proceeding, no certificate of appealability is required. If such a certificate were
4 required, the motion for a certificate of appealability would be denied because petitioner has not
5 made "a substantial showing of the denial of a constitutional right" with regard to his Rule 60(b)
6 motion. See 28 U.S.C. § 2253(c)(2).

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Petitioner's October 28, 2005 motion for a certificate of appealability is
9 denied; and

10 2. The Clerk of the Court is directed to process petitioner's notice of appeal filed
11 October 28, 2005.

12 DATED: January 12, 2006.

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14 /s/Lawrence K. Karlton
15 UNITED STATES DISTRICT JUDGE

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